Office - Supreme Court, U.S.
FILED
DEC 30 1983
ALEXANDER L. STEVAS,
CLERK

83 - 1082

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Petitioners,

vs.

DAN DURAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD J. DALEY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5460
Attorney for Petitioners

JANE CLARK CASEY,
Deputy State's Attorney
Chief, Civil Actions Bureau

HENRY A. HAUSER,
Assistant State's Attorney
Deputy Chief, Civil Actions Bureau
Of Counsel

The Scheffer Press, Inc.—(312) 263-6856

QUESTION PRESENTED

Whether the federal district court properly ordered the release on recognizance of pre-trial detainees from the Cook County Jail to enforce the provisions of a consent decree (1) where the local authorities charged with management of the county jail determined that limited emergency double-bunking in a newly remodeled section of the jail pending construction of new facilities was preferable to such release and was necessary to cope with a substantial increase in admissions and (2) where the proposed double-bunking would have been constitutionally permissible.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I.	
The Decision Of The Court Of Appeals Conflicts With This Court's Approval Of Inmate Double-Bunking In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), And Raises Significant, Disputed And Fundamental Questions Regarding The Proper Exercise of Federal Court Remedial Power As Applied To County Jail Management	14
II.	
The Decision Of The Court Of Appeals Conflicts With The Holding Of The Third Circuit In *Union County Jail Inmates* v. *Di Buono*, 713 F. 2d 984 (3rd Cir. 1983)	21
CONCLUSION	22
APPENDICES	
A - Opinion Of The United States Court of Appeals For the Seventh Circuit	1a
B - Memorandum Opinion And Order Of The United States District Court For the Northern District of Illinois - Eastern Division	1b

TABLE OF AUTHORITIES

CASES:

	PAGE
Bell v. *Wolfish*, 441 U.S. 520 (1979)	passim
DeFilippis v. *United States*, 567 F. 2d 341 (7th Cir. 1977)	17
Duran v. *Elrod*, 542 F. 2d 998 (7th Cir. 1976)	4
Lane v. *Sklodowski*, 97 Ill. 2d 311, 454 N.E. 2d 322 (1983)	15
Mayberry v. *Maroney*, 529 F. 2d 332 (3rd Cir. 1976)	18
People ex rel. Hemingway v. *Elrod*, 60 Ill. 2d 74, 322 N.E.2d 837 (1975)	19
Procunier v. *Martinez*, 416 U.S. 396 (1974)	21
Rhodes v. *Chapman*, 452 U.S. 337 (1981)	16
Rozner v. *Korshak*, 55 Ill. 2d 430, 303 N.E. 2d 389 (1973)	17
Schilb v. *Kuebel*, 404 U.S. 357 (1971)	19
Smith v. *Fairman*, 690 F. 2d 122 (7th Cir. 1982)	16
Union County Jail Inmates v. *DiBuono*, 713 F. 2d 984 (3rd Cir. 1983)	4, 21
Washington v. *Penwell*, 700 F. 2d 570 (9th Cir. 1983)	17

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

Article VII, Section 6(a), Illinois Constitution of 1970	17
Ill. Rev. Stat. 1981, ch. 38, par. 110-5	18
par. 1003-7-3	15
par. 1003-15-2	15
4 Ill. Reg. 190 (effective July 1, 1980)	17
Rule 60(b), Federal Rules of Civil Procedure	17

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Petitioners,

vs.

DAN DURAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, RICHARD J. ELROD, Sheriff of Cook County, Illinois, PHILLIP T. HARDIMAN, Executive Director of the Cook County Department of Corrections, the COOK COUNTY BOARD OF COMMISSIONERS and its members* in their official capacities, and the COOK COUNTY BOARD OF CORRECTIONS, and its

---

* The members of the Board of Commissioners of Cook County presently are George W. Dunne, President, Matthew W. Bieszcat, Charles R. Bowen, Bernard Carey, Frank W. Chesrow, Carl R. Hansen, Irene C. Hernandez, Mary M. McDonald, Daniel P. O'Brien, Jeanne P. Quinn, Matt Ropa, Richard A. Siebel, John H. Stroger, Jr., Martin Tuchow, Harold L. Tyrell, Samuel G. Vaughan, Joseph I. Woods.

members* in their official capacities respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 22, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported, appears herein as Appendix A. The district court's Memorandum Opinion and Order of March 22, 1983 (Release Order), which is unreported, appears herein as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1983. A timely Petition for Rehearing, with Suggestions for Rehearing *In Banc*, was denied on October 6, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

* The members of the Cook County Board of Corrections presently are Arthur R. Waddy, Chairman, Dorothy G. Drish, Vice-Chairman, Thomas J. Cooney, Frederick D. Sengstacke, David R. Rivera.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I.

INTRODUCTION

The heart of this case is whether or not the district court erred by ordering the recognizance release of pre-trial detainees from the Cook County Department of Corrections, rather than permitting limited emergency double-bunking until construction of a new pre-fab 500 bed facilitiy is completed.* The release of individuals from a pre-trial detention facility by a federal district court is a most serious matter. Because such federal action is so intrusive upon the state criminal justice system, and, thus, upon the people whom it is designed

---

* The County's plans to construct a 500 bed facility suffered a setback in the fall of 1983, when the low bidder for the project was found to be a disqualified bidder under a Cook County ordinance which prohibits, among other things, the letting of contracts to corporations which have pleaded *nolo contendere* to bid rigging charges. Nonetheless, the County (1) has purchased the design plans for the institution; (2) has completed site preparation work; (3) has obtained approval of the plans from various regulatory agencies, and other interested parties, including the plaintiffs; (4) has designated the engineering supervisor for the project; and (5) is presently negotiating to award the contract for the actual erection of the structure.

to protect, the district court should be affirmed only if no other legitimate enforcement alternative was available to get inmates off the floor of the department. County officials submit that limited emergency double-bunking should have been permitted to ease the population problem at the department because it was "a constitutionally adequate remedial scheme developed by responsible officials and [is] carried out within the context of existing state institutional structures, [and] would be far less intrusive than a remedy imposed on those officials against their own administrative judgment.", *Union County Jail Inmates* v. *Di Buono,* 713 F. 2d 984, 1002 (3rd Cir. 1983).* Review of the Seventh Circuit's ruling will afford the Court an opportunity to establish controlling precedent in the developing, troublesome area of local jail overcrowding, and to temper the conflict which now exists between the Third and Seventh Circuits on the specific issue of inmate release orders.

The facts which lead to the release order begin in 1976 when the Seventh Circuit sustained pre-trial detainees' class action complaint challenging the constitutionality of various aspects of their confinement. *Duran* v. *Elrod,* 542 F. 2d 998 (7th Cir. 1976).

Thereafter, substantial discovery ensued in the litigation, while construction of new department facilities,**

---

* The *Union County Jail* case was decided by the Third Circuit on August 11, 1983, a month after the Seventh Circuit ruled in the case at bar. *Union County Jail* was brought to the attention of the Seventh Circuit pursuant to Circuit Rule 11 while this case was pending on Petition for Rehearing which eventually was denied on October 6, 1983.

** Housing units at the Cook County Department of Corrections consist of:

the culmination of a $150 million master plan, approached completion.

The Division I Renovation

In 1977, the county officials determined that Division I, an old-style maximum security facility, should be renovated to provide needed capacity at the Department. Prior to the renovation, the Department had housed pre-trial detainees in Division I in 4′ by 8′ cells on a double-occupancy basis. Detainees had consistently challenged this arrangement as constitutionally impermissible overcrowding.

The renovation plan called for, among other things, the removal of the wall between adjacent sets of cells such that 8′ by 8′ cells were created. This resulted in a four-fold reduction in the capacity of Division I, assuming single occupancy of the renovated cells.

•• (Continued)

A. Division I — A five story structure built in 1929 with inmates housed in tiers. Prior to renovation, Division I housed two inmates per cell with a stated capacity of nearly 2400 inmates. After the renovation, Division I housed one inmate per cell with a stated capacity of 627.

B. Division II — Three buildings housing inmates and Cermak Memorial Hospital. Inmates are housed in large dormitory rooms. Division II's stated capacity is 1109.

C. Divisions III, IV, V, VI — Modern facilities which house inmates in detention rooms in wings on a double-occupancy basis. Division III houses only women inmates and has a stated capacity of 253. Division IV has a stated capacity of 704. Division V contains the reception and classification areas and has a stated capacity of 992. Division VI has a stated capacity of 992.

The Consent Decree

The consent decree of April 9, 1982 was hammered out after lengthy negotiations between the parties. The district court also had a hand in bringing the parties together, and bridging gaps in language about which the parties were in disagreement. The decree established the goals to be attained which included the avoidance of overcrowding and the provision of (1) adequate staffing, (2) adequate food supply and service, (3) adequate facilities and supplies for personal hygiene, (4) reasonable law library facilities and access thereto, (5) reasonable visiting privileges, (6) reasonable recreational facilities and access thereto, (7) appropriate classification standards, and (8) reasonable environmental health conditions.*

---

* The specific provision of the consent decree upon which detainees rely reads as follows:

> Division I shall be renovated according to the description provided in Appendix A, attached and made a part of this Order. Division I as renovated shall house one man per cell.

Consent Decree, par. 2.A.1, at 5.

When the decree was drawn the county officials insisted that the following language be included:

> Assuming the reasonably prompt implementation of any standards set forth in this Order, the totality of the conditions of confinement at the Cook County Department of Correction will continue to conform to the previously stated goals, and thus continue to protect the constitutional rights of the members of Plaintiff class. *It is not intended by this Order to indicate that such standards represent the minimum compliance with the constitutionally required goals, or that failure to have attained such standards in the past reflects a past failure to comply with constitutional requirements.* (Emphasis Supplied)

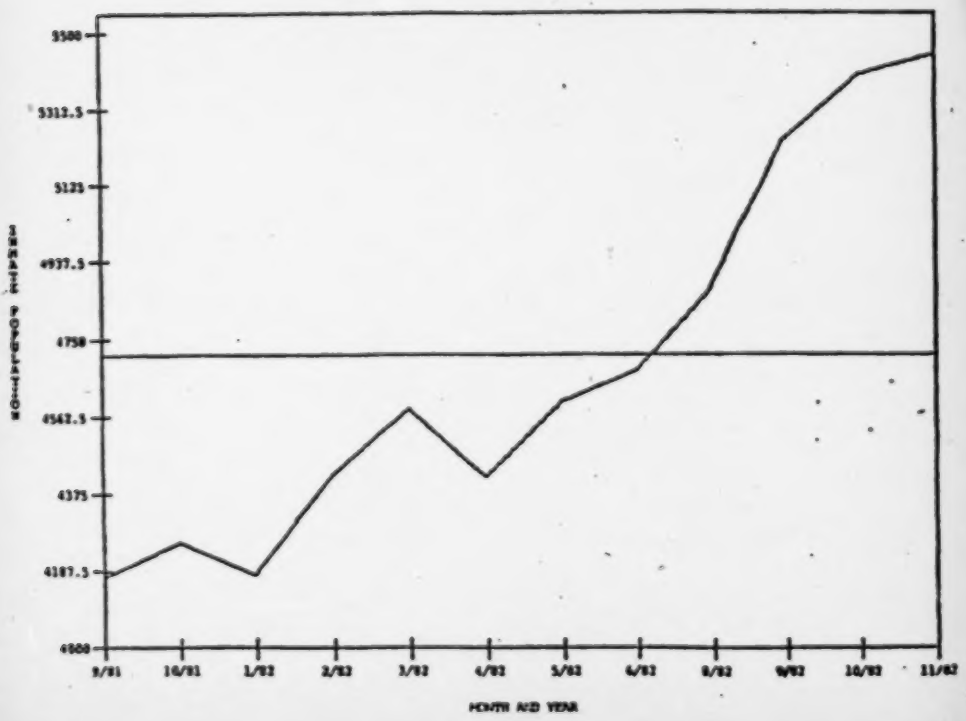
Consent Decree, at p. 4, par. h.

The Rise In Population

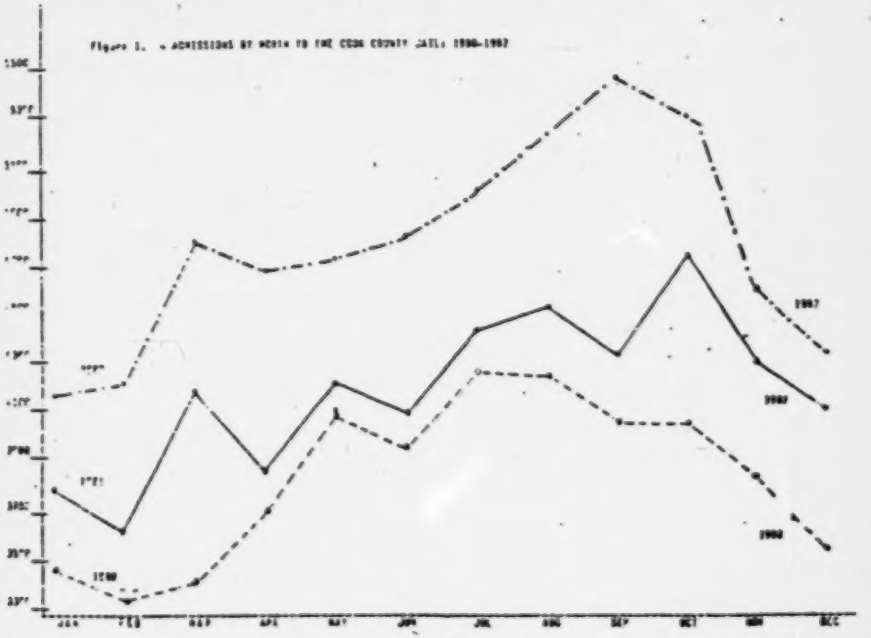
As early as May 14, 1982 the county officials met with detainees' attorneys and the court-appointed monitor for the purpose of discussing the overcrowding problem which was developing within the institution. A number of communications and conferences were had between the Department of Corrections and the County Board defendants with regard to plans and procedures for dealing with the developing situation at the Department of Corrections.

The following charts demonstrate the sharp increase in population which the department experienced in the summer of 1982. The first chart shows how the population simply shot up from an April, 1982 population of 4400 to a November, 1982 population of nearly 5400.

Figure 2. POPULATION - COOK COUNTY DEPARTMENT OF CORRECTIONS



The reason for the increase is apparent from the following graph which demonstrates the substantial increase in admissions to the department in 1982, as against 1981 and 1980.



The population increase experienced by the Department of Corrections in the summer and fall of 1982 was characterized by a National Institute of Corrections Technical Assistance Report as (1) "a rapid jump in inmate population", N.I.C. Report, at 3 and (2) "a sharp

increase in all population levels", N.I.C. Report, at 12. Indeed, the district court stated that the N.I.C. Technical Assistance Report, in which the foregoing charts appear, has "greatly assisted in evaluating the problem." Release order at 3, Appendix B at 3b.

The Rule To Show Cause

On October 21, 1982, the court-appointed monitor submitted a report which indicated that conditions at the Department of Corrections were deteriorating as a result of the overcrowding which the Department was experiencing. In that report the court-appointed monitor indicated that, "The relentless and rapid increase in the jail population in recent months has imposed hardships on the inmates, correctional staff, and the administration, and made it virtually impossible to achieve compliance with the goals outlined above." (Interim Compliance Report at 2)

On November 8, 1982, the detainees filed a petition for rule to show cause which brought to the district court's attention the matters already referred to in the report of the court-appointed monitor.

The petition for rule focused upon Divisions II and V of the Department, where the overcrowding in the institution was reflected. Neither the petition nor the affidavits in support of the petition allege that Division I was overcrowded.

The County Officials' Response to the Rule

The county officials responded to the petition for rule on December 1, 1982. Their response asserted that (1) the overcrowding was due to factors outside the control

of the department; (2) the National Institute of Corrections had been engaged to prepare a report on the system factors or attributes that were contributing to the overcrowding; (3) and that all inmates as of December 1, 1982 were issued sufficient mattresses, blankets, sheets and uniforms.

Other matters referred to in the rule were also alleged to have been dealt with as far as possible including staffing, personal hygiene, law library privileges, visiting, physical exercise, classification, environmental health, telephones, and disciplinary procedures.

The Cap Order

On January 26, 1983 the district court entered its order establishing a population limit of 4500 inmates for the Department of Corrections. The court found that "In recent months the inmate population at the Department of Corrections has consistently exceeded on a continuing basis, and continues to exceed, the actual number of beds available by several hundred persons." The court directed a reduction of Department population to 4500 by February 11, 1983 and ordered defendants to file "a report detailing (a) the methods defendants have chosen to reduce the inmate population to 4500 persons, and (b) the results achieved in reducing the population."

County Officials' Response to the Cap Order

As directed by the court, the county officials filed a status report on February 11, 1983 as to the actions taken to reduce the population at the department. These actions included the following:

(1) the county officials requested the Chicago Police Department to increase the appropriate use of recognizance bonds;

(2) the county officials requested the Presiding Judge of the First Municipal District of the Circuit Court of Cook County to communicate the importance of release on recognizance to judges of the First Municipal District;

(3) Director Hardiman of the Department of Corrections prepared lists of inmates who are non-multiple offenders on misdemeanor charges whose trials were scheduled after February 11, 1983. The State's Attorney was requested, where appropriate, and agreed to accept in misdemeanor cases decided prior to February 11, 1983 a sentence of time already served by the individual incarcerated;

(4) the Sheriff notified the State Department of Corrections that persons charged with the mere technical violation of parole were unacceptable to the Department;

(5) the Sheriff requested that Circuit Court judges not stay mittimus in criminal cases with regard to convicted defendants;

(6) the county officials requested the circuit court to send misdemeanants sentenced to a term between one year and sixty days to the State Department of Corrections rather than to the County Jail;

(7) the Sheriff and Director Hardiman reviewed the bond status of inmates and arranged them in classes of $1000, $2000, $3000, $4000, and $5000 bonds so that an emergency review program of these bonds could be made;

(8) the Sheriff obtained an estimate as to the cost of a modular jail and requested the Board of Commissioners of Cook County to authorize the construction of a 500-bed dormitory-type modular jail facility;

(9) the county officials contacted the City of Chicago Planning Department regarding obtaining property to the south of the jail complex for the construction of further long term jail facilities.

Concurrently with the status report of February 11, 1983, the county officials sought modification of the consent decree to permit limited emergency double-occupancy of cells in Division I of the Department. This motion was necessary because paragraph 2(a)(I) of the consent decree provided, in part, that "Division I, as renovated, shall house one man per cell." The motion indicated that Division I had been renovated according to a description appended to the decree to provide nineteen cells per tier each containing 64 square feet. Each cell was provided with a toilet, a steel unmovable bed, a mirror, a cabinet, and hot and cold running water. Each tier contains a day room adjacent to the cell area. On March 9, 1983 the County Officials filed further materials in support of the motion to modify the consent decree. The affidavit of Phillip T. Hardiman, the Executive Director of the Department, indicated that (1) short term double-bunking in Division I will permit individuals to be taken off the floor in Division V and to be double-bunked in 64 square foot cells in Division I, and (2) that short term emergency double-bunking in Division I will not affect the ability of that Division to provide reasonable conditions with regard to staffing, personal hygiene, visiting, physical exercise, classification, and environmental health.

The Release Order

On March 22, 1983, the district court ordered the Sheriff "to release on their own recognizance the persons

held in default of the lowest amount of bail, and among persons held on the same amount of bail the ones who have been confined for the longest time." (Order, at 5; Appendix B, at 3b-4b) The district court also confirmed the denial of defendants' motion for double-occupancy of cells in Division I.

On appeal,* the Seventh Circuit upheld the district court's refusal to permit double-bunking in Division I; and sustained the release order necessitated by denial of the motion to modify.

* A stay of the release order was entered by the Court of Appeals on April 15, 1983. The stay was vacated upon decision of the case on July 22, 1983.

REASONS FOR GRANTING THE WRIT

I.

The Decision Of The Court Of Appeals Conflicts With This Court's Approval Of Inmate Double-Bunking In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), And Raises Significant, Disputed and Fundamental Questions Regarding The Proper Exercise of Federal Court Remedial Power As Applied to County Jail Management.

In its leading correction law case, *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court stated, "Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination." *Bell* v. *Wolfish*, 441 U.S. at 562. This petition invites the Court to reaffirm its direction that "the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell* v. *Wolfish*, 441 U.S. at 562.

The undeniable effect of the district court's order is to require the release of pre-trial detainees who are being held at the Department of Corrections pursuant to state court orders. These state court mittimus orders have established the amount of bail necessary to insure the appearance of the pre-trial detainee at his next court date. While this situation exists in any jail conditions case where a "cap" is set, it nonetheless implicates very basic issues concerning state-federal relations. The impact of the release order upon the state court system requires close analysis and scrutiny of the alternatives to the

path chosen by the district court. County officials have attempted at every stage to alleviate the overcrowding problem* which the district court concedes ". . . is not within their control, for the population input at the Department of Corrections is generated by the state criminal justice system and not by defendants." (Release Order, at 2, Appendix B at 2b). County officials offered the reasonable alternative of double-bunking inmates in Division I until a 500-bed pre-fab facility is constructed. To that end the county defendants moved the court for a modification of the consent decree provisions requiring single-bunking in Division I. That motion, together with

---

* The corrections overcrowding problem has flared nationwide, and has put extreme pressure on the capabilities of state prisons and local jails. See "Illinois Prisons threaten to Turn Away Inmates From County Jails." New York Times, July 26, 1983, page 8; Time Magazine, "Cell Motel", Vol. 122, July 11, 1983, p. 42; "Early Releases Pose Crime Dilemma" U.S.A. Today, November 9, 1983, p. 7A. In Illinois these pressures resulted in *Lane* v. *Sklodowski*, 97 Ill.2d 311, 454 N.E.2d 322 (1983) in which the Illinois Supreme Court halted the incorrect "early release" of sentenced inmates from the State's prison facilities. The Illinois legislature has responded in part by deleting the statutory guidelines as to cell size, (see Senate Bill 546, amending Ch. 38, par. 1003-7-3, Ill. Rev. Stat. 1981 by *deleting* the language "All new, remodeled and newly designated institutions shall provide at least 50 square feet of cell, room or dormitory floor space for each person."); and by limiting the regulatory control of the state Department of Corrections as to local jails (See Senate Bill 546, amending Ch. 38, par. 1003-15-2, Ill. Rev. Stat. (1981), by adding the language, "such standards shall not seek to mandate minimum floor space requirements for each inmate in county or municipal jails and houses of corrections.") See Public Act 942, approved November 23, 1983.

the county's commitment to construct a new 500 bed facility are different sides of the same coin, and should preclude the sort of release order entered by the district court.

Division I cells contain 64 square feet and Director Hardiman has stated by affidavit that constitutional conditions will be maintained if double-bunking is permitted. Moreover, the Court's cases clearly hold that double-bunking is not punishment and does not, per se, violate the due process rights of pre-trial detainees. See *Bell* v. *Wolfish*, 441 U.S. 520, 541-542 (1979) (double-bunking in 75 foot square cells did not constitute punishment or violate due process); *Rhodes* v. *Chapman*, 452 U.S. 337, 348-349 (1981) (double-bunking in cells of 63 square feet did not constitute punishment where "the double-celling . . . made necessary by the unanticipated increase in prison population did not lead to deprivations of essential food, medical care, or sanitation. Nor did it increase violence among inmates or create other conditions intolerable for prison confinement." *Rhodes, supra*, at 348-349; and the Seventh Circuit has sustained double-bunking. See *Smith* v. *Fairman*, 690 F. 2d 122 (7th Cir. 1982) (double-bunking in older (Pontiac) facility in cells of 64 square feet was not punishment and not unconstitutional.) Thus, there is no constitutional imperative against the emergency double-bunking of detainees in Division I until the crisis has passed with the construction of the new 500 bed facility.

Certain provisions of state law,* and the consent decree itself do not purports to establish constitutional minima to be placed on the Department of Corrections. The consent decree entered below constituted a commitment by these defendants to the court as to goals set forth in the decree. Entry by government agencies into such decrees is not without risk or uncertainty, especially in jail conditions suits, where those entering into the decree do not have effective control of the elements within the system which create the problem. Nonetheless there are two factors which induce governmental defendants to enter into such decrees. First, a consent decree is written by the parties, and they therefore have control of the definition, articulation, and resolution of the dispute. Secondly, consent decrees, like any other judgments, are subject to modification under Rule 60(b) where there are legal or factual changes which render the decree inequitable.**

---

* Detainees have argued that Illinois state jail standards, which provide "all existing cells and detention rooms shall be designated for single occupancy." 4 Ill. Reg at 206, Sec. 8-2 (effective July 1, 1980), operate to limit double-bunking. However, the standards do not apply to Cook County, which is a home-rule unit. See Ill. Const. 1970 Article VII, Sec. 6(a) and *Rozner* v. *Korshak*, 55 Ill. 2d 430, 435, 303 N.E. 2d 389, 391-392 (1973). Furthermore, in *Bell* v. *Wolfish*, 441 U.S. 520 (1979) the Court noted regarding minimum standards that ". . . while recommendations of these various groups may be instructive in certain cases, they simply do not establish constitutional minima; rather, they establish goals recommended by the organization in question." *Bell*, 441 U.S. at 544 n. 27 (1979).

** A subsidiary issue is raised as to whether the district court properly applied rule 60(b) law in refusing to modify the consent decree. See *Washington* v. *Penwell*, 700 F. 2d 570, 574 (9th Cir. 1983); *De Filippis* v. *United States*,

The district court's refusal to permit limited emergency double-bunking, and order requiring the release on recognizance of pre-trial detainees is wrong for the following reasons:

First, the release order ignored other available and less intrusive remedies for the enforcement of the consent decree. Thus, limited emergency double-bunking was incorrectly rejected by the district court.

Secondly, the release order substitutes a truncated, federally imposed recognizance scheme in place of Illinois' bail bond system. It is the Illinois General Assembly, not the state court judges, which sets the substantive guidelines for bail in Illinois*. The Seventh Circuit's

---

** (Continued)

567 F. 2d 341, 343-346 (7th Cir. 1977); and *Mayberry* v. *Maroney*, 529 F. 2d 332, 335-336 (3rd Cir. 1976). The Seventh Circuit's surface treatment of this issue ("The County facilities were crowded at the time of the Decree and have remained so since." Slip. Op. at 9. Appendix at 9a), coupled with its circumscribed "bargain theory" of institutional consent decrees (Slip. Op. at 9, Appendix A at 10a), contributed substantially to the slighting of the important local governmental and state interests at stake in this case.

* See generally, ch. 38, par. 110-1 *et seq.* Ill. Rev. Stat. 1981. The state court judges set bail on the following basis:

Sec. 110-5. Determining the amount of bail.
(a) The amount of bail shall be:
(1) sufficient to assure compliance with the conditions set forth in the bail bond;
(2) not oppressive;
(3) commensurate with the nature of the offense charged;

statement that "The district court fashioned a remedy placing the responsibility for the jail on the appropriate parties and not in the federal court." Slip op. at 11, it Appendix A at 12a), is, therefore, wholly illusory since it ignores the reality that the Illinois judges lack authority to override legitimate policy set by the legislative branch.

Thirdly, the Seventh Circuit's conclusion that those who would benefit from the release order are not subject to serious state bail requirements is without logical support in the record. Indeed, bail setting takes into account several complicated factors bearing on orderly court proceedings and public safety and welfare. Dissatisfaction with the state court bail system hardly justifies its unprincipled revision under the guise of dealing with local jail overcrowding. Courts, which necessarily exist to resolve specific disputes, lack the necessary breadth of input and information to resolve such fundamental questions. *Bell* v. *Wolfish*, 441 U.S. at 547-548 (1979).

Fourth, both the Seventh Circuit and the district court ignore the fact that there is no relationship between the amount of bail and the likelihood of appearance at trial. As the 1980 Supplemental Report of the Illinois Judicial Conference Study Committee on Bail Procedures points out:

---

* (Continued)

(4) considerate of the past criminal acts and conduct of the defendant;
(5) considerate of the financial ability to the accused. . .

Ch. 38, par. 110-5 Ill. Rev. Stat. 1981; *See also People ex rel. Hemingway* v. *Elrod*, 60 Ill. 2d 74, 322 N.E. 2d 837 (1975); *Schilb* v. *Kuebel*, 404 U.S. 357 (1971).

> Since the purpose is to assure that the defendant will appear for trial, courts have traditionally pegged the obligated sum or financial security requirement to the seriousness of the crime charged on the assumption that the risk of flight increases with the potential punishment to be faced if convicted at trial. Totally rational, this view ignores the individual circumstances of the particular defendant, *for persons with strong community ties and good background may be far better risks to appear for later proceedings on serious accusations than the transient charged with a minor offense.* (Emphasis supplied).

Supplemental Report, at 29.

County officials submit that review of the record will clearly demonstrate that limited emergency double-bunking in Division I should have been permitted to ease the population problem at the Department, and that the Seventh Circuit's opinion affirming the district court's release order clearly misapplies the law applicable to this case. At present, extraordinary pressures are brought to bear on local officials whose duties include the maintenance of the detention facilities in various localities in Illinois.

As the Court noted in *Bell* v. *Wolfish,* 441 U.S. 520 (1979), "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." (citations omitted) *Bell,* at 544, n. 25; and, thus, review of this case is warranted to determine whether the district court has, indeed, made an incorrect "judgment call" in an area "confined to officials outside the Judicial Branch of Government." *Bell* v. *Wolfish,* 441 U.S. at 562.

II.

The Decision Of The Court of Appeals Conflicts With the Holding Of The Third Circuit In *Union County Jail Inmates* v. *DiBuono*, 713 F. 2d 984 (3rd Cir. 1983).

Affirming the district court's release order, the Seventh Circuit observed, "This court is under the impression that the County defendants are attempting to avoid compliance with the Consent Decree by rewriting the terms which they have difficulty meeting. It was reasonable for the district court to enter what it considered the best remedy to the overcrowding in the County jail facilities." Slip op. at 13, Appendix A at 13a While giving lip service to considerations of federalism, the court below has held effectively that the concerns of federalism and judicial restraint set out in cases like *Bell* v. *Wolfish*, 441 U.S. 540, 562 (1979) and *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974) have diminished impact where a jail conditions case has been settled by consent decree.

On the other hand, the Third Circuit in *Union County Jail Inmates* v. *DiBuono*, 713 F. 2d 984 (3rd Cir. 1983) permitted double-bunking and reversed a release order entered by the district court in precisely the same context of local jail overcrowding in the face of a consent decree which purported to preclude double-bunking. The Third Circuit stated, "We, therefore, hold that the district court, in its zeal to correct what it perceived as unconscionable conditions, improperly exercised its discretion by rejecting the Commissioner's proposed remedial scheme and by ordering the removal of state prisoners from the county facility." *Union County Jail Inmates* v. *DiBuono*, 713 F. 2d 984, 1003 (3rd Cir. 1983).

The case at bar (just as did *Union County Jail*) presents a clear fact situation favoring judicial deference to those legitimately charged with local corrections decision-making. When two Circuits reach such disparate results in similar cases, this Court's clarification of the substantive rules, and the process of decision would be most appropriate and helpful to that portion of the bench and bar confronted with these consistently troublesome corrections issues.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RICHARD J. DALEY
State's Attorney of Cook County
500 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5460
Attorney for Petitioners

JANE CLARK CASEY,
Deputy State's Attorney
Chief, Civil Actions Bureau

HENRY A. HAUSER,
Assistant State's Attorney
Deputy Chief, Civil Actions Bureau
Of Counsel

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1574

DAN DURAN, et al.,

Plaintiffs-Appellees,

v.

RICHARD ELROD, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2949—Milton I. Shadur, *Judge.*

ARGUED JUNE 6, 1983—DECIDED JULY 22, 1983

Before WOOD and CUDAHY, *Circuit Judges,* and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* The Plaintiffs-Appellees are a certified class consisting of all pretrial detainees in the custody of the Cook County Department of Corrections. The Defendants-Appellants are Richard J. Elrod, the Sheriff of Cook County, Phillip T. Hardiman, the Executive Director of the Cook County Department of Corrections, the Cook County Board of Commissioners and its members in their official capacities and the Cook County Board of Corrections and its members in their of-

* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

ficial capacities (hereinafter "County officials" or "County defendants"). The plaintiff detainees filed this class action in 1974, pursuant to 42 U.S.C. § 1983. The detainees charged the defendant County officials with violations of their rights under the Eighth and Fourteenth Amendments to the United States Constitution by failing to provide safe and humane conditions of confinement. After extensive discovery and negotiations between the parties, a comprehensive Consent Decree was entered by the district court on April 9, 1982. This Decree called for the renovation and modernization of the county jail facilities; increasing of staff personnel; improvement in food services and provision of personal hygiene supplies; increased access to the law library; more physical exercise periods and increased hours for visitation. As part of the Consent Decree, the parties agreed that the John Howard Association (hereinafter "Monitor") should be appointed by the district court to review and evaluate the implementation of the Decree at set time intervals. The district court retained jurisdiction over the case in order to enforce as necessary the Decree. This case is presently before this Court on expedited appeal from a subsequent district court order.

On October 9, 1982, the John Howard Association submitted their first six month report regarding jail conditions. The Monitor found that the goals outlined in the Consent Decree had not been achieved. The Monitor reported that, by the second week of June 1982, among inmates assigned to Division II, 375 were not assigned a bed. The report continued that by September 27, 1982 the population in Division II had reached 1,285 men with 436 sleeping on the floor, a large number without mattresses or blankets. R. 15, Ex. B, p. 4. In Division V, 370 men were sleeping on the dayroom floors, many again without mattresses or blankets. In October 1982 in the Women's Division (Division III) from 15 to 50 women were sleeping on mattresses on cell floors. The Monitor reported that one of the contributory factors to the jail population was the retention of low-bond inmates for

longer periods because of inability to raise a relatively small amount of bail. The report indicated that from 500 to 750 inmates could be released "if they had only $100." *Id.* at p. 5. As a result of the Monitor's report, the detainees filed a Petition for a Rule to Show Cause why the County defendants should not be held in contempt for violating the Consent Decree. That petition was granted.

Hearings were held, and on January 25, 1983, the district court ordered a "cap" on the population of Department of Corrections at 4500 inmates. This figure was arrived at to assure that each inmate would have a bed. The defendants were directed to file with the court by February 11, 1983 a report detailing (a) the method chosen to reduce the inmate population and (b) the results achieved in the reduction of the population. R. 19, p. 3.

On February 11, 1983, the defendant County officials filed a status report, including the Director's Log from January 21 to February 8, 1983, which indicated that on February 8, 1983 the jail population was 4,830 with 4,583 beds available. At the same time, the defendants filed a Motion for Relief from the population "cap" ordered on January 25, 1983 and a Motion for modification of the Consent Decree requesting double-bunking in Division I. At a March 2, 1983 status hearing, Judge Shadur called for the parties to submit criteria for the release of inmates in order to reach the "cap". The plaintiffs suggested on March 4, 1983 the use of the same criteria used by Judge Lasker in the New York case, *Benjamin* v. *Malcolm*, No. 75 C 3073 (S.D. N.Y. filed June 23, 1981), i.e., release on their own recognizance those persons in default of the lowest amount of bail, and among those held on an equal amount of bail, the ones who had been confined the longest. R. 27. The defendants failed to submit a criteria, contending that release of inmates was beyond their legal authority. R. 26, p. 2. On March 21, 1983, the district court's Minute entry denying the defendants' Motion to Modify the Consent Decree was docketed. The follow-

ing day, March 22, 1983, the district court entered the Opinion and Order subject of this appeal. Judge Shadur held:

> This Court therefore orders (as did Judge Lasker) [*Benjamin* v. *Malcolm, supra*] that if compliance with the Order requires a reduction in inmate population at the D of C at any time after April 15, 1983 and if no Illinois state court of competent jurisdiction has then specified a different method of selecting the persons to be released to accomplish such reduction, Sheriff Elrod and Director Hardiman are directed to release on their own recognizance the persons held in default of the lowest amount of bail, and among persons held on the same amount of bail the ones who have been confined for the longest time. This order leaves the primary and direct responsibility with the state court judiciary, where both the litigants and this Court agree it belongs.
>
> This order also confirms the denial of defendants' motion for double celling of Division I at the D of C. That would represent a step backward from the salutary provisions to which defendants agreed when they co-authored the Decree.

R. 31.

The County defendants immediately appealed from that March 22 Memorandum Opinion and Order docketed March 29, 1983. R. 32. A stay of the district court Order was granted by this Court on April 15, 1983.

Upon appeal, the following issues were raised:

1. Whether the district court incorrectly denied the County officials' Rule 60(b) Motion to modify the Consent Decree to permit double-bunking in Division I;

2. Whether the district court in its March 22, 1983 Opinion and Order exceeded its authority in directing the release of low-bond pretrial detainees.

I.

Motion to Modify Consent Decree

It must initially be noted that the detainees argue that this Court is without jurisdiction to review this issue as the Notice of Appeal failed to designate an appeal from the February 11 Order denying modification of the Decree. The Minute entry was dated February 11, 1983, the date the County officials filed their Motion to modify, but the entry was *not docketed* until March 21, 1983. The March 22, 1983 Opinion and Order stated in conclusion "[t]his order also confirms the denial of defendants' motion for double celling of Division I at the D of C."

Fed. R. App. P. 4(a)(1) provides:

> (a) Appeals in Civil cases.
>
> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the *date of entry* of the judgment or order appealed from; . . .

(emphasis added). The date of entry has been defined as occurring:

> . . . when the essentials of a judgment or order are set forth in a written document separate from the court's opinion or memorandum and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action in the district court. This dual requirement is established by Civil Rule 58, Entry of Judgment, which states that "[e]very judgment shall be set forth on a separate document" and that "[a] judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Rule 4(a), which

> is derived without change in substance from a former civil rule, incorporates both of these standards.

Caperton v. *Beatrice Pocahontas Coal Co.*, 585 F.2d 683, 688 (4th Cir. 1978) (footnotes omitted).

In this instance, the date of entry of the initial denial of the Motion to modify was March 21, 1983. This was confirmed by the Order of March 22, 1983. The notice of appeal was filed March 30, 1983.

The requirements of Fed. R. App. P. 3(c) that a notice of appeal "shall designate the judgment, order or part thereof appealed from . . ." have been given liberal interpretation by federal appellate courts. It is unmistakable that the defendants intended to appeal both the opinion ordering release of low-bond detainees to meet the "cap" and the denial of the modification requested. Both issues were addressed in the Opinion, a final appealable order. The release order became necessary when the request for modification was denied.

> The rule is now well settled that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake.

9 Moore's Federal Practice ¶203.18, p. 3-76-77 (1983) (footnotes omitted).

As the Supreme Court pointed out in *Foman* v. *Davis*, 317 U.S. 178, 181-2 (1962):

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of

> pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

Under the facts of this case, there was no prejudice to the appellees as both parties argued the merits of the issues on appeal. *See Hennessy* v. *Schmidt*, 583 F.2d 302, 306 (7th Cir. 1978). We will consider both issues on appeal.

The County officials contend that their request for an emergency double-bunking modification of the Consent Decree was precipitated by the unforeseen and substantial increase in admissions to the jail facilities in 1982.[1] They contend that the temporary change in the Decree is necessary in order to cope with the unforeseen emergency population growth. Defendant Phillip T. Hardiman indicated in his affidavit (R. 26, Ex. D) that short-term double-bunking in Division I will permit taking individuals off the floors in Division V, and that double-bunking would not affect the reasonable conditions of the division.

---

[1] Beginning in June of 1982, the Cook County Department of Corrections began to experience population levels which were in excess of design capacity and one hundred to two hundred inmates over the average number of operable cells (bed space) available to the Department. By early fall, the number of inmates housed in the Cook County Department of Corrections on an average day had climbed to between five hundred and six hundred above its conventional operating capacity of 4,500 inmates. By October and November of 1982, the average daily population levels in the Cook County Department of Corrections were fluctuating between seven hundred and eight hundred inmates above the jail's capacity. Report of The National Institute of Corrections, p. 1-2 (January 31, 1983), R. 22, Ex. 3.

The County officials argue that they have made a good faith effort to meet the goals set in the Consent Decree. They contend their Rule 60(b) motion is clearly less intrusive to federalism than the release of individuals, confined under the state court system, on their own recognizance pursuant to the guidelines of the March 22 Order. The County officials argue that their modification proposal is especially appropriate because the County has already approved the construction of a new 500 bed modular jail facility.[2]

Rule 60(b) is an extraordinary remedy requiring "a showing of exceptional circumstances of grievous wrong evoked by the new unforeseen condition." *DeFilippis* v. *United States*, 567 F.2d 341, 342 (7th Cir. 1977). As District Judge Lasker held earlier in *Benjamin* v. *Malcolm*, 528 F. Supp. 925, 928 (S.D. N.Y. 1981), modification under Rule 60(b) requires "that a significant change of circumstance shall have occurred since the date of the final judgment to warrant its modification." Justice Cardozo held in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1931):

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The *injunction*, whether right or wrong, *is not subject to impeachment in its application to the conditions that existed at its making.* We

[2] It should be noted that the County defendants first began to speak of a proposed new 500 bed facility in mid-February 1983 indicating a six to eight month completion date. As of June 6, 1983 when oral arguments were heard on this case not one spade of ground has been turned. Counsel, in answer to a question regarding construction, reported that approval had been obtained but a bond issue was necessary, soil samples had to be taken and final plans drawn up. In other words, the start of construction is sometime down the road.

> are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.*

(Emphasis added).

As the detainees pointed out in brief and at oral argument to this Court, the County officials have failed to show any unforeseen or unexpected condition since the entry of the Decree. The County facilities were crowded at the time of the Decree and have remained so since. *See Benjamin* v. *Malcolm,* 528 F. Supp. at 929. The Third Circuit, when considering the modification of a consent decree to allow the emergency confinement of Pennsylvania inmates for a maximum of 48 hours in a basement facility required the showing of exceptional circumstances and extreme hardship unless the relief was granted. *Mayberry* v. *Maroney,* 558 F.2d 1159, 1163, (3d Cir. 1977), *See also McGoff* v. *Rapone,* 78 F.R.D. 8, 24 (E.D. Pa. 1978). We do here also.

In the case at hand, the County officials have requested a modification of the Decree to allow double-bunking (an additional 627 beds) in Division I. Such a modification would allow approximately 250-300 inmates to be assigned beds.

This Court weighed these figures and legitimate concerns with the National Institute of Correction's projection of inmate population "in excess of 6,000 by early

1984 unless changes in policy and practices alter the current trends." R. 21, Ex. 3, p. iii. While the population of the County facilities has been slowly decreasing from the November 1983 high (the downward trend notable since the January 25, 1983 imposition of a population "cap"), the modification of the cell occupancy in Division I, the delay in the construction of the new facility and the expectation of at least normal inflation of inmate population attacks the integrity of the Consent Decree. The County officials made a free deliberate choice when it agreed to settle this dispute and terminate the long costly litigation. The parties engaged in arms-length bargaining and the detainees have a justified expectation that the bargain freely entered will be honored. As the detainees have pointed out, remedial measures regarding the jail population were not implemented until after the petition for a Rule to Show Cause was filed.

This Court finds that the County Defendants have failed to show an unforeseen and substantial change in circumstances since the entry of the bargained for Consent Decree nor an extreme hardship if their proposed remedy is not granted. The district court did not abuse its discretion in denying the County defendants' Rule 60(b) motion to modify. *DeFilippis* v. *United States,* 567 F.2d at 343; *Ben Sager Chemicals International, Inc.* v. *E. Targosz & Co.,* 560 F.2d 805, 809 (7th Cir. 1977); *Beshear* v. *Weinzapfel,* 474 F.2d 127, 130-31 (7th Cir. 1973).

II.

March 22 Release Order

The County defendants contend that they have carefully shaped a remedy for the overcrowding conditions through the proposed new construction and limited emergency double-bunking. They submit that they have submitted a reasonable constitutional remedy which directly addresses the issue of overcrowding and does not inter-

fere with decisions of the state court system. The County officials argue that the district court's release order is an unwarranted intrusion into the County's authority.

The issue before this Court is whether the district court's choice of remedies for the overcrowded conditions and enforcement of the Consent Decree was an abuse of its discretion. As the Supreme Court held in *Lemon* v. *Kurtzman,* 411 U.S. 192, 200 (1973) when "shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *See also United States* v. *City of Chicago,* 631 F.2d 469 (7th Cir. 1980). An abuse of discretion occurs when "no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found." *Harrington* v. *DeVito,* 656 F.2d 264, 269 (7th Cir. 1981), *cert. denied,* 455 U.S. 993 (1982).

The March 22 Opinion and Order clearly indicated that the district court was aware of, and sensitive to, the need to strike a proper balance between the integrity of the Consent Decree and the principles of federalism. R. 31, p. 2. The implementation of a population ceiling was recommended by the Monitor. The figure of 4500 reached after hearings and commendations by counsel reflected the capacity of the facility, minus a numerical factor as a buffer for repairs, etc. The district court, when it set the "cap," clearly left to the appropriate state and county agencies the determination of the means to reach the population "cap." While the appropriate agencies in early 1983 began to consider remedial measures, it was Judge Shadur's determination that "the problem will not go away and that a means must be selected to assure effective compliance with the ceiling set by the Order." *Id.* at p. 4. (The district court had previously set a date of February 11, 1983 but that date had been postponed pending the recommendations of the parties). These appropriate agencies have failed to come up with a proposal within the principles of the Decree.

The Release Order called for the reduction of the inmate population through the release, on their own recognizance, of low-bond pretrial detainees as necessary to reach the "cap." These releases would occur after April 15, 1983 "if no Illinois state court of competent jurisdiction has then specified a different method of selecting." *Id.* at p. 5. As Judge Shadur pointed out, the March 22 Order placed the primary and direct responsibility on the state court judiciary to meet the problems in the prisons and begin corrective methods. *Id.* The district court fashioned a remedy placing the responsibility for the jail on the appropriate parties and not in the federal court.

It should be noted that the persons eligible for possible release on their own recognizance are low-bond pretrial detainees. These individuals have not been convicted of the crime for which they are being detained, but are in the preliminary stages of a criminal proceedings and are unable to make bail. Low-bond detainees ($500 or less) averaged over 800 inmates in the County facilities from August-November 1982. R. 22, Ex. 3, p. 8. These detainees represented 60% of the increase in the jail population in 1982. *Id.* In November 1982, approximately 200 jail inmates required bonds of less than $100 and another 200 required bonds up to $200. Plaintiffs' Sur-Reply filed December 13, 1982, Ex. B, Appellants' Appendix, p. A-145. Thus, the possible beneficiaries of the Release Order are not convicts nor are they subject to serious state bail requirements.

The district court, when it entered the March 22 Opinion and Order was confronted with a nearly year-old Consent Decree and substantial noncompliance with that Decree by the County defendants. These officials had been invited to develop a workable remedy and their only suggestion was to modify the bargained-for Consent Decree. The district court did not act precipitiously but rather acted fairly and reasonably to ease a critical problem. As Judge Shadur pointed out in his Opinion, State and County agencies must address this problem.

> From a longer range point of view, the Cook County Board has just authorized construction of supplemental facilities with a capacity of housing 500 inmates—a step that can be taken much more expeditiously than a more ambitious building project. That too is a means that should have been addressed before the situation reached its current crisis proportions, but once in place it will obviously ease (though not solve) the situation. This entire matter of overcrowding needs constant monitoring to prevent recurrence, and one of the real dangers of a "solution" that involves simply increasing the number of available spaces is that it might create a tendency for the various responsible state agencies to ease up and let the problem get out of hand again—not intentionally, but because the matter might no longer be viewed as a pressing immediate need. Unfortunately correctional institution population tends to operate somewhat like the law of physics in which a gas always expands to fill the available space.
>
> R. 31, p. 4 n.5.

This Court is under the impression that the County defendants are attempting to avoid compliance with the Consent Decree by rewriting the terms which they have difficulty meeting. It was reasonable for the district court to enter what it considered the best remedy to the overcrowding in the County jail facilities.

Conclusion

This Court affirms the Opinion and Order of the district court of March 22, 1983 and revokes the Stay of that Order granted April 15, 1983 by this Court. This case is remanded to the district court for supervision of the March 22, 1983 Order and the underlying Consent Decree. This Court awards attorney's fees and costs to the appellees.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 2949

DAN DURAN, et al.,

Plaintiffs,

v.

RICHARD ELROD, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs have petitioned for a rule to show cause why defendants[1] should not be held in contempt for violating the April 9, 1982 Consent Decree (the "Decree") in this action. Defendants have freely admitted they are in violation of a whole host of provisions of the Decree and that essentially all the violations are directly related to the terribly overcrowded conditions at the Cook County Department of Corrections (the "D of C").[2] Defendants

[1] Defendants are Cook County Sheriff Richard J. Elrod, Executive Director of the Cook County Department of Corrections Phillip T. Hardiman, Cook County Board of Commissioners President George Dunne and the other members of that Board, and the members of the Cook County Board of Corrections.

[2] When the petition was first filed November 4, 1982, over 800 inmates were sleeping on floors, many without mattresses. As of defendants' latest status report (March 21, 1983), the efforts referred to in this opinion had brought the D of C population down to 4,687. Though the report did not specify the total number of available beds, the information on that score in prior reports would indicate that the number of inmates currently sleeping on mattresses (without beds) was likely in the range of 100 to 200.

say accurately enough that for the most part the matter of overcrowding is not within their control, for the population input at the D of C is generated by the state criminal justice system and not by defendants.

From the outset this Court has been concerned with striking the proper balance between maintaining the integrity of this Court's orders[3] and respecting the principles of federalism. After several hearings and status reports, this Court determined that goal could best be served by establishing a ceiling on the number of inmates to be confined in the present D of C facilities at any one time. That form of resolution, strongly recommended by the John Howard Association (designated by the parties to serve as the monitor under the Decree), is well supported by precedent and is within this Court's jurisdiction under 28 U.S.C. §2202. Equally importantly, it leaves the *means* of conforming to the ceiling to the relevant branches of state government. Thus this Court does not inappropriately involve itself as the day-to-day overseer of the functioning of a part of the state's penal system —a prospect that, when it has had to be faced elsewhere in the country, has inevitably created great tensions.

There is no dispute between the parties that though the nominal bed capacity of the D of C is 4,677, at all times approximately 200 beds are in fact unavailable for various reasons. This Court's January 25, 1983 order (the "Order") accordingly so found, and it therefore re-

---

[3] Although the Decree was initially consensual (and contractual) in nature, its entry by this Court made it enforceable like any court order. Decree ¶12.D provided:

> This Order, including its attached Appendices constitutes a final disposition of this litigation as to all defendants with respect to the injunctive and declaratory relief claimed by plaintiffs and the class. Jurisdiction of this cause is hereby specifically retained by the Court to enter further orders necessary or appropriate to enforce the terms of this Order.

quired defendants to reduce the inmate population at the D of C to 4,500 persons. It initially set a date of February 11, 1983 for that purpose, but circumstances proved that time period inadequate.

Since that time defendants' periodic status reports (also called for by the Order) have shown a *general* downward trend[4] in inmate population, as various partial solutions have been put into effect by the various state authorities. This Court has been greatly assisted in evaluating the problem by the January 31, 1983 technical assistance report from the National Institute of Corrections and, most recently, by a March 20, 1983 report from consultant Joseph A. Trotter, Jr. of that Institute's staff (Mr. Trotter was working on a contractual basis, and his report did not represent the official views or policy of the Institute).

From the latest consultant's report it appears that constructive efforts continue to be made by various branches of state government to deal with the matter. Currently most promising is the state judiciary's contemplated establishment of a night court system to provide effective screening, when individuals are arrested or processed after normal court hours, so they may avoid ever getting into the detention system at all. That eminently sensible response would seem to have been called for long since.[5] It is hoped to be implemented "as early as April" according to the consultant.

---

[4] Differing circumstances from week to week preclude a uniform pattern of declining population at the D of C. Accordingly there have been some spurts upward in the amount of overcrowding during the past two months.

[5] From a longer range point of view, the Cook County Board has just authorized construction of supplemental facilities with a capacity of housing 500 inmates—a step that can be taken much more expeditiously than a more ambitious building project. That too is a means that should have been addressed before the situation reached

From the regular status reports since the Order was entered, it has become increasingly plain that the problem will not go away and that a means must be selected to assure effective compliance with the ceiling set by the Order. Again this Court has taken into account the relevant considerations of federalism, while at the same time holding the parties to their agreements as embodied in this Court's formal order approving the Decree. This Court has determined that the most appropriate measure is one that follows the precedent established by Judge Lasker of the United States District Court for the Southern District of New York in dealing with comparable problems in the New York metropolitan area correctional system *Benjamin* v. *Macolm,* 75 Civ. 3073 (MDL) and related cases June 23, 1981).

This Court therefore orders (as did Judge Lasker) that if compliance with the Order requires a reduction in inmate population at the D of C at any time after April 15, 1983 and that no Illinois state court of competent jurisdiction has then specified a different method of selecting the persons to be released to accomplish such reduction, Sheriff Elrod and Director Hardimen are directed to release on their own recognizance the persons held in default of the lowest amount of bail, and among persons

---

* (Continued)

its current crisis proportions, but once in place it will obviously ease (though not solve) the situation. This entire matter of overcrowding needs constant monitoring to prevent recurrence, and one of the real dangers of a "solution" that involves simply increasing the number of available spaces is that it might create a tendency for the various responsible state agencies to ease up and let the problem get out of hand again—not intentionally, but because the matter might no longer be viewed as a pressing immediate need. Unfortunately correctional institution population tends to operate somewhat like the law of physics in which a gas always expands to fill the available space.

held on the same amount of bail the ones who have been confined for the longest time. This order leaves the primary and direct responsibility with the state court judiciary, where both the litigants and this Court agree it belongs.

This order also confirms the denial of defendants' motion or double celling of Division I at the D of C. That would represent a step backward from the salutary provisions to which defendants agreed when they co-authored the Decree.

.....

Milton I. Shadur
United States District Judge

Date: March 22, 1983